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JAMES R. BROWNING, Cl

No. 851

IN THE

Supreme Court of the United States

October Term, 1960

YELLOWSTONE PIPE LINE COMPANY,

Petitioner,

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA; DAN FULTON, E. J. BYRNE and JOHN C. ALLEN, members of and constituting The State Board of Equalization of the State of Montana; YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana; MARJORY C. THOMPSON as Treasurer of the said Yellowstone County, Montana and T. A. COTHRON as Assessor of said Yellowstone County, Montana,

Respondents.

OIL BASIN PIPELINE COMPANY,

Petitioner,

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA; DAN FULTON, E. J. BYRNE and JOHN C. ALLEN, members of and constituting The State Board of Equalization of the State of Montana; YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana; MARJORY C. THOMPSON as Treasurer of the said Yellowstone County, Montana and T. A. COTHRON as Assessor of said Yellowstone County, Montana,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

SAMUEL W. McINTOSH
1266 National Press Building
Washington, D.C.
Attorney for Petitioners,
Yellowstone Pipe Line Company;
Oil Basin Pipeline Company

ARTHUR THAD SMITH
410 Continental Oil Building
Denver 2, Colorado
Attorney for Petitioner,
Yellowstone Pipe Line Company

E. HUGHES
Building
Street
Montana

HAMPTON
ental Oil Building
olorado

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Montana entered in the above causes on December 30, 1960 (Appendix, p. 43) reversing and setting aside judgments of the District Court, Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone (Appendix, pp. 45, 47) and ordering the causes remanded to the District Court with instructions to make and enter judgments in favor of the respondents and against

each of the petitioners consistent with the views expressed in the Montana Supreme Court opinion.

OPINIONS BELOW

The opinions of the Supreme Court of Montana are unofficially reported in 358 P. 2d 55 (February 3, 1961 Advance Opinions) but have not as yet been officially reported in the Montana State Reports. These opinions are shown commencing at Page 1 of the Appendix. The District Court prepared no separate opinion but entered certain Findings of Fact and Conclusions of Law (R. 79-100, 179-199).

JURISDICTION

After the initial decision of the Montana Supreme Court on July 26, 1960, an Order granting a rehearing was entered on September 28, 1960, and after oral argument pursuant to such Order, final judgment was entered on December 30, 1960 (Appendix, p. 43). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The court below decided against petitioners' contention that the assessment of their pipe line properties was discriminatory in violation of the equal protection of the laws clause of the Fourteenth Amendment of the United States Constitution. Such decision of the Montana Court involved a federal question of substance and was not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

While most property in Montana is assessed for ad valorem tax purposes by the county assessors, property constituting single and continuous property throughout more than one county is assessed by the State Board of Equalization (herein sometimes called "the Board"). The Board apportions each assessment made by it to each county in which the assessed property is situated on a mileage basis and the county assessor then enters such assessment on his

assessment rolls. (Revised Codes of Montana, 1947, Sections 84-901 through 84-907.) While it is provided by statute that all taxable property must be assessed at its full cash value (Revised Codes of Montana, 1947, Section 84-401), real property (which comprises the bulk of property subject to ad valorem taxes) in Yellowstone County and elsewhere in Montana has, over the years, been intentionally and systematically assessed by the local assessors at less than 35% of full cash value. The Board of Equalization in making its assessments, however, does not adhere to this practice of the local assessors, although it is fully aware of such practice. Moreover, the Board does not apply any uniform percentage to properties that it assesses but treats each taxpayer's property on an individual basis, applying a different percentage in each case, the percentage applied being determined by the Board in its discretion without the application of any uniform standards. The percentages applied by the Board are, however, in all cases higher than the figure applicable to locally assessed property. The Board in going through this assessing process does not purport to treat property that it assesses differently than real property on the grounds that such property is of a different class but on the contrary laments the existence of this bad assessment picture.

After property has been so assessed, the Board then classifies the property in accordance with the classification statute (Revised Codes of Montana, 1947, Sections 84-301, 84-302) and the taxes on such property are then computed accordingly (R. 91, 92, 190, 191; Revised Codes of Montana, 1947, Section 84-402). This classification statute sets forth seven different classes of property and the percentage to be applied to property in each class to arrive at its taxable value, such percentage being different for each class of property. This statute has been held constitutional in the case of *Hilger v. Moore*, 56 Mont. 146, 182 P. 477 (1919), on the theory that it comprises a proper classification of properties providing for the relative burden of ad

valorem taxes which should be borne by each different class of property within the state.

The Supreme Court of Montana held that the assessment of each of the petitioners' properties involved no violation of the Fourteenth Amendment of the United States Constitution because the assessing process as carried out by the Board reflected merely a different treatment of a different class of property within the authority of *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362.

While the basic federal question here involved is the violation of the equal protection of the laws clause of the Fourteenth Amendment, this question is, in the interests of clarity in presentation, divided into two parts as follows:

(1) whether various statutes and constitutional provisions of Montana have been administered in such a manner as to deprive the petitioners of equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution;

(2) whether the assessment of petitioners' pipe line properties was discriminatory as against petitioners in violation of the equal protection of the laws clause of the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED[1]

The statutes involved in this case, some of which are lengthy, are set forth verbatim commencing on Page 50 of the Appendix. The citation of these statutes and a brief explanation thereof follows:

(a) Section 84-901 through Section 84-907 (Repl. Vol. 5, Revised Codes of Montana, 1947, Pages 533-536); provide that the State Board of Equal-

[1]In addition to the above enumerated statutes, there are certain provisions of the Montana Constitution and certain additional Montana statutes, which, although not directly involved in the constitutional question here presented.

ization shall make the original assessment of intercounty property and set forth the procedures and manner in which such assessments shall be accomplished.

(b) Section 84-401 (Repl. Vol. 5, Revised Codes of Montana, 1947, Page 489), prescribes that all property shall be assessed at "full cash value".

(c) Section 84-301 (Repl. Vol. 5, Revised Codes of Montana, 1947 (1959 Cumulative Pocket Supplement), Pages 51-52), is the Montana classification statute.

(d) Section 84-302 (Repl. Vol. 5, Revised Codes of Montana, 1947, Page 485), specifies the percentage of true and full value of property in each class, which shall be taken as a basis for the imposition of taxes.

STATEMENT

These are companion cases separately brought by each of the petitioners in January, 1956, to recover 1955 ad valorem taxes on pipe line properties paid under protest to the county treasurer for Yellowstone County, Montana, in November, 1955. The pipe line properties of each

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provide certain background material which may be of assistance to the Court in considering this case. These are:

Article XII, Section 1, Montana Constitution (Repl. Vol. 1 (Part 1), Revised Codes of Montana, 1947, Page 233), requiring the legislative assembly to prescribe regulations to secure a just valuation for taxation of all property;

Article XII, Section 11, Montana Constitution (Repl. Vol. 1 (Part 1), Revised Codes of Montana, 1947, Page 253), requiring that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax;

Section 84-708 (Repl. Vol. 5, Revised Codes of Montana, 1947, Pages 521-522), outlining the statutory duties of the State Board of Equalization;

Section 84-402 and 84-404 (Repl. Vol. 5, Revised Codes of Montana, 1947, Pages 489 and 490), requiring the county assessors and the Board, respectively, to determine the percentage basis to be assigned to property under the classification statute;

Section 84-721 (Repl. Vol. 5, Revised Codes of Montana, 1947, Page 529), providing for the manner in which each county shall enter on its county assessment book the assessment made by the State Board of Equalization on intercounty property.

petitioner, having constituted a single and continuous property throughout more than one county, were in the first instance assessed by the State Board of Equalization and the assessment so arrived at was transmitted to the county assessors for entry on the assessment rolls. The complaint in each case alleged, among other things, that the assessment so made by the Board deprived the petitioners of due process of law and denied petitioners the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R. 8, 117).

At the trial the following facts were established:

The Board, after arriving at a full cash value of each of petitioners pipe line properties in Montana in accordance with the Revised Codes of Montana, 1947, Sections 84-901 through 84-907 (Appendix, pp. 52-55), determined the assessed value for such properties by taking a percentage in each case of the full cash value, the percentage used in the case of the properties of the Yellowstone Pipe Line Company being 74.02% and that in the case of Oil Basin Pipe Line Company being 76% (R. 87, 186). At the time that the Board was so assessing each of petitioners pipe line properties, (1) the Board well knew that real estate in Yellowstone County, Montana, and throughout all of the State of Montana was intentionally and systematically assessed by the respective county assessors at far less than the full and true value thereof, the state-wide average being 30.55% and the average for Yellowstone County being 31.5% of full cash value (R. 88, 187), and (2) the Board was recommending to county assessors that various properties, such as motor vehicles, oil field equipment, supplies, livestock, lumber, neon signs, and so forth, be assessed at various percentages of full cash value ranging from 50% to 70% (R. 89, 187, 188), and (3) the Board was assessing the pipe line properties of Montana Dakota Utilities and Interstate Pipe Line Company, the only other two intercounty pipe lines situate within Yellowstone County, at 68.26% of full cash value for Montana Dakota Utilities.

and 62.55% of full cash value for Interstate (R. 89-91, 188, 189). In applying the foregoing percentages to arrive at the assessed value of petitioners' pipe line properties, the Board did not purport to be treating them differently from real estate generally on the grounds that such properties were of a different class but was torn between the consideration that it felt it should give to Section 84-401, Revised Codes of Montana, 1947 (Appendix, p. 52), which requires that all property be assessed at full cash value, and its knowledge that this statute was not being observed by the county assessors and its further knowledge that real estate was being assessed, in fact, at far less than full cash value. The individual percentages applied by the Board in arriving at the assessed values were applied in a vague effort to compromise this situation (R. 262, 263). This discriminatory situation was a continuing one and there is nothing in the record to show that it was ever corrected, but, on the contrary, it is evident from the record that at the time of the trial in 1958, little had been accomplished in the direction of correcting such situation (R. 263).

After trial, the District Court concluded that the assessment of each of petitioners pipe line properties denied petitioners equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States (R. 98, 99, 198) and entered judgment for each of the petitioners for a portion of the tax paid under protest (R. 103, 200).

On appeal by the Board to the Supreme Court of Montana[2], petitioners each argued in support of the District Court's conclusion of law on the constitutional question. The Supreme Court of Montana, after the initial briefs and arguments, reversed the judgment of the District Court and filed a majority opinion by Chief Justice Harrison, with a dissenting opinion by Justice Adair. The majority opinion held against petitioners on the question of a

[2]Petitioners also filed a cross appeal on the grounds that the relief granted by the District Court was not as much as they were entitled to for various reasons as set forth in their cross appeals, respectively (R. 787, 789).

violation of the Fourteenth Amendment of the United States Constitution. The dissenting opinion held that such constitutional amendment had been violated. Thereupon, the petitioners filed a petition for rehearing, again alleging that the assessment of each of their pipe line properties and the administration of certain statutes and constitutional provisions of Montana were in violation of the Fourteenth Amendment of the United States Constitution. Oral argument was had on rehearing on October 20, 1960, and the opinions and judgments heretofore referred to were handed down on December 30, 1960.

The majority opinion of Chief Justice Harrison, concurred in by Justices Castles and Angstman and District Judge Loble (sitting in place of Justice Bottomly), again held that there had been no violation of the Fourteenth Amendment of the United States Constitution, and Justice Adair again expressed the view that there was such a violation. The court ordered the earlier opinions and judgments withdrawn and that the opinions filed December 30, 1960, be substituted therefor and entered final judgment reversing the District Court and remanding the cases to the District Court with instructions to make and enter judgments in favor of appellant and against each respondent consistent with the views expressed in such opinion.

The decision below thus necessarily rests upon the determination of a federal question by a majority of the court. This was an essential ground for the decision of the majority. A summary showing the way in which the federal question sought to be reviewed was raised and passed upon is shown in the Appendix, pp. 56, 57. The federal question is thus properly presented for consideration by this Court.

REASONS FOR GRANTING THE WRIT

The Montana Supreme Court in its holding in these cases has applied the holding of this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S.

362, to a situation not passed upon in that case and has failed to take cognizance of numerous decisions of this Court, which, in passing upon situations more or less similar to that presented in this case, have held the Fourteenth Amendment violated. The importance of the questions here presented is evident from the fact that under the holding of the Montana Court individual taxpayers may be discriminated against by assessing officials with impunity.

I.

The situation in the *Browning* case, which came before this Court on writ of certiorari to the Supreme Court of Tennessee, differs from the situation here presented to this Court in two respects. First, in Tennessee there was no statute classifying property for ad valorem tax purposes as is the case in Montana. Second, the Railroad and Public Utilities Commission, which was the assessing board in that case, followed a practice and had followed a practice for many years of assessing railroad properties at 100% of actual full cash value in contrast to the individual treatment accorded to the several pipe line companies which the State Board of Equalization assessed in the case here presented. These are significant differences.

In Montana the classification statute (Appendix, p. 50) establishes the classification of property and specifies the percentages to be applied in arriving at assessed values for property in each class. The very purpose of this statute was to establish the relative tax burdens to be borne by property in each class. In *Hilger v. Moore*, 56 Mont. 146, 182 P. 477 (1919), the Montana Court commented on this statute as follows at page 173 of the Montana Reports:

> "In theory, the doctrine of classification seeks to remove the temptation to dishonesty in returning property for assessment; to shift the burden of taxes from property, as such, to productivity, or, in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its

> general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens, or as nearly so as may be, and to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts. Whether in practice it will realize the hopes of its advocates, experience alone will demonstrate."

In the more recent case of *Yellowstone Bank v. State Board of Equalization*, ... Mont. ....., 351 P. 2d 904 (1960), the Supreme Court of Montana emphasized that the establishing of a formula for the determination of the basis for the imposition of taxes on each class of property is the sole prerogative of the Legislature, saying at Page 908 of the Pacific Reporter:

> "* * * The Legislature may devise its own formula to determine the basis for the imposition of taxes on the property in question, namely, bank shares and 'moneyed capital'. This court has said, 'The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for the purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Hilger v. Moore, 56 Mont. 146, 172, 182 P. 477, 483."

From this it logically follows that any further classification or application of different or additional percentages in the assessing process is inconsistent with the statute. The holding in the *Browning* case rested upon the fact that what the Commission did there amounted to a settled practice. It is fair to assume that here the statute reflects the settled state law. How can anything incon-

sistent with it help but fall short of achieving the dignity of a settled practice which amounts to state law?

This point was argued vigorously before the Montana Court on rehearing. The Montana Court in its opinion, however, advanced the view that notwithstanding the classification statute, the Board, under Section 15 of Article XII of the Montana Constitution, which says, "the state board of equalization shall adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers", has the power by implication to determine just what property belongs in the same class. This interpretation appears to permit the classification of property by the Board without regard to inconsistencies between the Board's action and the classification statute and, under the facts of this case, without regard to principles of uniformity among individual taxpayers.

But even if we accept the view of the Montana Supreme Court that the Board can properly set up classifications of property inconsistent with the classification statute, there remains the question of whether the Board actually did this. The record in this case is conclusive that it did not. It did not purport to establish any separate class for pipe lines. It treated each pipe line property differently, thereby precluding any inference that by uniform treatment of pipe line properties it was by implication setting them up as a separate class. As a matter of fact, it classified petitioners' properties in Class 7 of the classification statute (R. 35), thereby accepting the statute as prescribing the class into which such properties fall and the relative percentages of true and full value to be applied in arriving at the taxable value of property in each class.

But then the Board went ahead and assigned a percentage in making its assessment of petitioners' pipe line properties, which caused petitioners' relative share of the

tax burden to be three times that of real property generally instead of one-third greater as is prescribed by the statute. This can be readily demonstrated as follows. Assuming certain pipe line properties have a full cash value of $10,000 and certain real estate in the same county has a full cash value of $10,000, the taxable value of the pipe line properties applying the classification statute is $4,000 and that of the real property is $3,000. But if the pipe line properties are first assessed at 75% of full cash value (to take a round figure) the ultimate taxable value is 75% x $10,000 x 40%, or $3,000, while the real property, if is is assessed at 31.5% as was the case in Yellowstone County, ends up with a taxable value of 31.5% x $10,000 x 30%, or $945. The position of petitioners, whose pipe line properties were assessed at 74.02% and 76% of full and true value, is obvious.

In so administering the statutes of Montana, the Board has discriminated against petitioners in violation of the Fourteenth Amendment[3]. This Court has held in a number of cases that a statute otherwise constitutional may be administered in such a manner as to violate the Fourteenth Amendment. *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535; *Hanover Fire Insurance Co. v. Carr*, 272 U.S. 494; *St. Louis SWR Company v. Arkansas ex rel Norwood*, 235 U.S. 50; *Corn Products Refining Company v. Eddy*, 249 U.S. 427.

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[3]In a number of cases where the question involved was the proper procedure for bringing a case before this Court, it has been held that a proper judgment of a state court sustaining a tax assessment alleged to be illegal because of discrimination can be reviewed only on certiorari. *Ex parte Williams* 277 U.S. 267 (1928). And, in one case where the matter was brought before this Court on appeal, the appeal was treated as a petition for a writ of certiorari. *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182 (1945). The implication from these cases is that ad valorem tax cases do not involve a question of the constitutionality of a statute. Notwithstanding these authorities, we think that this case does involve a question of the proper administration of certain statutes in Montana and it is petitioners' contention that these statutes have been administered in violation of the Fourteenth Amendment. These statutes are (1) Revised Codes of Montana, 1947, Section 84-401 (Appendix, p. 52), requiring that all property be assessed at full cash value, (2) Revised Codes of Montana, 1947, Section 84-901 through 84-907 (Appendix, pp. 52-55), authorizing the State Board of Equalization to assess property constituting a

Perhaps the argument might be advanced that such a situation, as bad as it is, involves only a matter of concern to the state, and, if the Montana Court finds nothing wrong, that is the end of the matter. If the Board here, in departing from the classification statute, had been uniform in its discrimination against Class 7 properties, or even pipe line properties, such an argument might merit some comment. But such is not the case. The individual treatment of taxpayers shown here cannot come within the shelter of settled state practice recognized in the *Browning* case. This is crystal clear in the testimony of E. J. Byrne, a member of the Board, where he says in substance that the Board knew that its assessments were not consistent with those of local assessors, which the Board felt was wrong, but that is an area in the assessing process where the board is unsure of its footing (R. 262, 263).

Finally, the holding of the Montana Supreme Court in these cases, insofar as it upholds the assigning, on an individual basis, of a higher percentage of value to petitioners' property than that generally prevailing in Yellowstone County, is not in accord with numerous decisions of this Court, one of which is here cited: *Sioux City Bridge Co. v. Dakota County, Nebraska*, 260 U.S. 441.

In a later case, similar discrimination on an individual

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single and continuous property throughout more than one county, and (3) Revised Codes of Montana, 1947, Sections 84-301 and 84-302 (Appendix, p.), establishing the classification of property and assigning the percentage of true and full value to be applied to property in each class. Had these statutes been followed by the assessing officials in Montana, there would be no question of discrimination in this case. What the Board did here was indirectly to cause and bring about a wrongful and discriminatory administration of the classification statute, which, as applied to these petitioners, resulted in an administration of this statute in violation of the Fourteenth Amendment. Also, in connection with Revised Codes of Montana, 1947, Section 84-401, requiring that all property be assessed at full cash value; the Court's attention is called to the case of *Greene v. Louisville & Interurban R. Co.*, 244 U.S. 499; *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, and the enlightening A.L.R. notes on this subject—3 A.L.R. 1370, 28 A.L.R. 983, 55 A.L.R. 503—which say that such a statute must give way to requirements of uniformity in taxation where it appears that property is assessed at some percentage of full cash value rather than at full cash value as required by the statute, and that where this situation occurs, an individual taxpayer whose property is assessed at a higher percentage is entitled to have his assessment reduced to conform to the prevailing practice.

basis against a member of a class was condemned. *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23.

The Montana Court admits this discrimination but seeks to justify it by showing that the Board was motivated by good intentions. In the *Cumberland* case, however, this Court said:

> "There is no question that the assessments under review were made pursuant to a deliberately adopted system. The case is not one of mere errors in judgment in following a proper method (Sunday "Lake Iron Co. v. Wakefield Twp. 247 U. S. 350, 352, 353, 62 L. ed. 1154-1156, 38 S. Ct. 495; Southern R. Co. v. Watts, 260 U. S. 519, 526, 67 L. ed. 375, 387, 43 S. Ct. 192), but one where the challenged discrimination resulted from a plan of assessment which was none the less systematic and intentional because of belief in its validity. Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 37, 52 L. ed 78, 87, 88, 28 S. Ct. 7, 12 Ann. Cas. 757; Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 445, 67 L. ed. 340, 342, 28 A.L.R. 979, 43 S. Ct. 190; Chicago G. W. R. Co. v. Kendall, 266 U. S. 94, 98, 99, 69 L. ed 183, 188, 189, 45 S. Ct. 55." (Page 25 of 284 U.S.)

Moreover, the Montana Court is in error in seeking to justify this situation on the basis that taxing officials cannot be expected to achieve perfect uniformity in taxation. Such an observation may be true with respect to determining the full and true value of each individual taxpayer's property because value is a matter of opinion, but it obviously is not true when applied to the assessing procedure of the Board as presented in this case because the Board could easily have applied exactly the same percentage to each taxpayer's property after the Board had determined its full and true value. By assigning percentages on an individual basis, the Board followed a fundamentally wrong and unconstitutional method of assessment.

II

The decision of the Montana Supreme Court upholds the practice of the Board of assigning, on an individual basis, the percentage of full and true value to be applied to each taxpayer's property for assessment purposes. Carrying this decision to its logical conclusion, if the Board can do this, each county assessor can do the same, and there is no limit upon the discrimination which might be practiced against an individual taxpayer. This is a departure from anything that has been upheld by this Court and is a violation of the equal protection clause of the Fourteenth Amendment. Under the decision of the Montana Court, the whole structure of the Montana ad valorem taxation system remains in a chaotic condition.

Moreover, the decision of the Supreme Court of Montana lays down no legal principles for the Board to follow in determining the percentage of true and full value to be applied in the assessing process.

If such decision is allowed to stand, taxpayers in Montana will be exposed to having their properties assessed on an individual basis at varying percentages of full cash value with no possibility of relief.

Thus, the importance of the question here presented is self-evident.

CONCLUSION

The singling out of the pipe line properties of each of the petitioners for discriminatory treatment on an individual basis by the Board was a violation of the Fourteenth Amendment under many decisions of this Court. The record in this case also shows that the Board in administering various tax statutes in Montana administered them in such a manner as to deny petitioners equal protection of the laws required by the Fourteenth Amendment. Finally, the opinion of the Montana Supreme Court reflects an erroneous application by that court of the *Browning* case. In view

of the clear violation of the Fourteenth Amendment shown in this case and the simplicity of the problem involved, and in view of the further fact that the Judgment of the District Court was consistent with the legal principles laid down by this Court in numerous decisions, we respectfully submit that the petition for a writ of certiorari should be granted and the Judgment of the Supreme Court of Montana should be forthwith reversed with instructions for such further proceedings as may be necessary, consistent with the Judgment of the District Court (Appendix, pp. 45-49).

Respectfully submitted,

SAMUEL W. McINTOSH
1266 National Press Building
Washington, D.C.
Attorney for Petitioners,
Yellowstone Pipe Line Company,
Oil Basin Pipeline Company

ARTHUR THAD SMITH
410 Continental Oil Building
Denver 2, Colorado
Attorney for Petitioner,
Yellowstone Pipe Line Company

Of Counsel:

MICHAEL J. HUGHES
Toomey Building
11 Edwards Street
Helena, Montana

CLYDE R. HAMPTON
410 Continental Oil Building
Denver 2, Colorado

March, 1961

APPENDIX A

OPINIONS BELOW

OPINIONS OF THE SUPREME COURT OF MONTANA

(Title of Court and Cause)

George T. Bennett, Esq., Helena, Montana, argued orally for Appellant.

Edmond G. Toomey, Esq., Helena, Montana, Michael J. Hughes, Esq., Helena, Montana, and

A. T. Smith, Esq., Denver, Colorado, argued orally for Respondents.

Submitted: February 9, 1960.

Decided: Dec. 30, 1960

FILED Dec. 30, 1960

THOMAS J. KEARNEY, Clerk

Mr. Chief Justice Harrison delivered the Opinion of the Court.

In this cause a rehearing was granted and it appearing that the opinion heretofore promulgated herein should be redrafted, the same is hereby withdrawn and the following opinion substituted therefor.

This is an appeal by the State Board of Equalization from a judgment of the district court of the thirteenth judicial district whereby assessments by the State Board of Equalization for ad valorem tax purposes of the property of two oil product pipe line companies, the Yellowstone Pipe Line Company, and the Oil Basin Pipe Line Company,

were set aside in part as excessive, discriminatory, and in contravention of the provisions of sections 1 and 11 of Article XII, and section 27 of Article III, of the Constitution of Montana, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The pipe line companies, hereafter referred to as "Yellowstone" and "Oil Basin", each brought suit to recover taxes paid under protest to the assessor of Yellowstone County, Montana. The causes were consolidated for trial upon stipulation of the parties.

Both pipe line companies appealed from the findings below that their property was correctly placed in Class 7 under section 84-301, R.C.M. 1947, the Montana Classification statute, each contending that its proper classification is Class 4, i.e., "land, town and city lots, with improvements, manufacturing and mining machinery, fixtures and supplies."

Since November 14, 1954, Oil Basin has been engaged in business as a common carrier, transporting refined oil products from Billings to Glendive, Montana, via an underground pipe line. Its pipe line extends 234.776 miles through Yellowstone, Treasure, Rosebud, Custer, Prairie, and Dawson Counties. Oil Basin also owns personal property used in its business which is located in Yellowstone County, Montana.

Since September 30, 1954, Yellowstone has been engaged in business as a common carrier, transporting oil products between Billings, Montana, and Spokane, Washington. It owns 440.65 miles of 10 inch pipe in Montana, traversing the counties of Yellowstone, Stillwater, Sweetgrass, Park, Gallatin, Jefferson, Broadwater, Lewis and Clark, Powell, Granite, Missoula, Lake and Sanders; 4.16 miles of 8 inch pipe in Yellowstone County; 4.20 miles of 4 inch pipe in Yellowstone County, and delivery facilities, pump stations, and other property necessary to its business.

In 1955, both Yellowstone and Oil Basin filed reports

with the State Board of Equalization wherein the financial condition of each company was shown along with statements showing the mileage of pipe to be found in the various counties and school districts through which the pipe lines pass.

The State Board of Equalization, hereinafter referred to as the Board, considered the property of both Yellowstone and Oil Basin to be "property * * * which constitute a single and continuous property throughout more than one county" within the meaning of section 84-901, R.C.M. 1947, and subject to assessment by the Board by virtue of section 84-905, R.C.M. 1947.

The Board then assessed all the properties of Oil Basin at a figure of $3,856,166. From this sum the Board deducted the value of property which had been locally assessed by the county assessors of Dawson and Yellowstone Counties in the amount of $99,750. The remainder, $3,756,416 was apportioned among the counties through which Oil Basin's pipe line pass at the rate of $16,000 per mile. In Yellowstone County, where Oil Basin owned 74.374 miles of pipe line, the Board notified the County Assessor that Oil Basin's property in Yellowstone County had an assessed valuation of $1,189,984. Further, the Board classified the pipe line property of Oil Basin as property in Class 7, within the meaning of section 84-301, R.C.M. 1947.

The property of Yellowstone in Montana was assessed by the Board at $8,468,250. From this figure, the Board deducted the value of Yellowstone's property which was locally assessed by the County Assessors of Yellowstone, Gallatin, Lewis and Clark, Missoula, Sanders, Granite, and Sweetgrass Counties in the aggregate of $303,984. The remaining figure, $8,164,266, was apportioned among the counties through which Yellowstone's pipe line passed at the rate of $15,310 per mile for 10 inch pipe, $16,000 per mile for 8 inch pipe, and $7,000 per mile for 4 inch pipe. Yellowstone's property in Yellowstone County was assessed

at $513,978. Yellowstone's property also was placed in Class 7 under section 84-301, R.C.M. 1947.

Both Oil Basin and Yellowstone applied to the Board for a hearing and petitioned for a reassessment and a reclassification of their respective properties. After a hearing before the Board on September 19, 1955, the Board denied any relief.

Oil Basin's taxes for Yellowstone County were computed at $37,944.01 for 1955. Oil Basin paid one-half of that sum, $18,972.01 on November 30, 1955, under protest, claiming that $16,896.94 of that sum was unlawful. Within 60 days after paying such taxes, Oil Basin commenced this action to recover the taxes paid under protest, joining the Board, Yellowstone County, and the Treasurer and assessor of Yellowstone County as parties defendant.

Yellowstone Pipe Line Company's taxes for Yellowstone County were computed at $18,313.39. On November 26, 1955, Yellowstone paid this sum under protest, and within 60 days after such payment commenced this action against the same defendants, claiming that $8,745.36 was excessive and unlawfully demanded.

Both causes were consolidated and came on regularly for trial before the court sitting without a jury on August 27, 1958. The court made findings of fact and conclusions of law and entered judgment in favor of both plaintiffs, from which judgment this appeal followed.

This case concerns itself with one of the most complicated and easily misunderstood aspects of taxation in Montana, that is, the assessment of property. Not only this court, but the courts of many other states have been confronted with the problem of judging the legality of assessment procedures. The Constitutions and statutes of the various states differ with respect to the process of assessment for tax purposes. About the most that can be said is that the Constitutions and statutes of all states forbid discrimination among owners of the same type of property.

And whether or not the plaintiffs here have been discriminated against by the State Board of Equalization in the assessment of their property is the basic question on this appeal.

To understand the issues in this case, it is necessary to consider first, the over-all status of assessment in Montana, and second, the method of assessment used by the State Board of Equalization with respect to property that extends through more than one county and is subject to original assessment by the Board pursuant to section 84-901 and 84-905, R.C.M. 1947.

At the trial in the district court, Mr. Edward J. Byrne, a member of the Board, testified at great length as to the status of assessments generally in Montana. Section 84-401, R.C.M. 1947, requires that all taxable property be assessed at its full cash value. Mr. Byrne testified that for many years there has been a substantial departure from the language of this statute with the result that local property has been and is assessed quite low in many fields. The Board for many years has sought to bridge the gap between assessments among the various counties and has sought to establish some uniformity among the counties. Mr. Byrne stated that the Board, consequently, has been confronted with the alternative of trying to equalize assessments even though the level at which they are fixed is below the statutory requirement of true cash value. As an example of the Board's attempt to unify assessments even though it may result in an assessment lower than true cash value, Mr. Byrne indicated that the Board has promulgated schedules of oil drilling equipment which set forth the value at which various types of drilling equipment should be assessed. These have been distributed among the various county assessors with the result that now most of this property is uniformly assessed.

The situation remains, however, that much property in the State of Montana is placed on the assessment rolls at only a percentage of its true and actual value, in violation

of the statute. Mr. Byrne's testimony reveals that the Board has been attempting to raise assessments so that all property will eventually be placed on the rolls at its true cash value, in conformity with the statute. The Board also is attempting to do this fairly and uniformly. Hence, if some property has been assessed at a high percentage of its true cash value, the Board will lower the assessment so that it will approximate the percentage at which similar property is placed on the assessment rolls.

In order to accomplish equalization with respect to property that is subject to assessment by the Board originally, the Board applies to what it considers the true cash value of such property what is termed an "equalization factor". The equalization factor theoretically represents the percentage of true cash value at which similar property is placed on the assessment rolls.

With this background in mind, let us proceed to consider the method of assessment used by the Board with respect to the properties of the plaintiffs herein. For the sake of clarity, let us break down the process by which the Board reaches the figures which it supplied to the Assessor of Yellowstone County, at which the property of the plaintiffs herein was placed on the assessment rolls. The process can be divided into four stages, assessment, allocation, equalization and apportionment.

ASSESSMENT.

As shown by the testimony at the trial, the first thing the Board did with respect to both plaintiffs here was to take the information that each company had supplied in their reports and attempt to fix the full and true value of each company as an operating unit. This involves application of what is termed the "unit rule of valuation". The theory of this rule is this: Where property is part of a continuous system which extends through many taxing districts, the proper way to find the true cash value of any part of this property requires that the system as a unit be evaluated.

The rationale of this theory is that, where a system is involved, the sum of the value of the parts of the system does not truly represent the total value thereof, and therefore, in order to get a true reflection of the economic value, the system as a whole must be valued as a unit. In order to find the value of the Oil Basin Pipe Line Company the Board averaged the stock and debt value and the cost of plant and equipment. The stock and debt value was found by adding the value of the first mortgage bonds outstanding, the value of sinking fund debentures issued, and the value of Oil Basin's common stock at market value. First mortgage bonds which were due in one year were not included because the Board felt that they would not contribute to an accurate picture of the value of the company. Capitalization of net operating income was not computed in the average because the company had been in operation for only a short while and the Board felt that no proper annual estimate of income could be made. The cost of plant and equipment, as indicated by the report of Oil Basin to the Board, was averaged. This average of stock and debt value and cost of plant and equipment was $5,072,908. This, in the Board's mind, represented the true and full cash value of all the property of Oil Basin Pipe Line Company.

In finding the unit value of Yellowstone Pipe Line's property, the Board followed a similar procedure. It averaged stock and debt value, 6 percent capitalization of estimated annual income, and the cost of plant and equipment. Stock and debt value was computed by adding the value of common stock at par, the value of serial notes, and by subtracting the sum of over $6 million which the Board felt represented an excessive cost of construction in the light of the fact that Yellowstone had been required to traverse unusually treacherous terrain. By averaging these three elements, the Board estimated the true and full cash value of all Yellowstone's property at $13,388,747.

ALLOCATION.

The term "allocation" as used in this case means the process of attributing to the taxing state the value of a portion of an interstate system for tax purposes. Since Oil Basin's property is located entirely within the State of Montana, no allocation was necessary. But as was said earlier, Yellowstone's pipe line extended through Montana, Idaho and Washington. With respect to Yellowstone's pipe line therefore, the Board was required to determine what portion of Yellowstone's property is located in Montana. In order to accomplish this the Board averaged three elements: the percentage of Yellowstone's total cost that was expended for its property located within Montana, the percentage of the total income that was derived in Montana, and the percentage of the total mileage of pipe found in Montana. The resulting average, 85.45 percent was determined to represent the percentage of total value of Yellowstone's entire system which should be allocated to Montana for tax purposes. The Board then merely multiplied the total unit value of $13,388,747 by this percentage and found that value of Yellowstone's property allocated to Montana should be $11,440,684.

EQUALIZATION.

As has been heretofore mentioned, the Board attempts to make uniform local assessments and to make uniform assessment of property which is subject to original assessment by the Board by applying what is termed an equalization factor to true cash value. This is simply the process of determining that property of a certain nature is generally placed on the assessment rolls at a certain percentage of its true and full value. When other property comes before the Board, it attempts to insure that that property will be placed on the assessment rolls at approximately the same percentage of true and full value.

With respect to Oil Basin, the Board applied an equalization factor to what it had determined to be Oil Basin's

true and full value, of approximately 76 percent, thereby determining the value for tax purposes of Oil Basin's property in Montana at $3,856,166. With respect to Yellowstone, the Board applied an equalization factor of approximately 74 percent to what it had determined to be the value of Yellowstone's property in Montana of $11,440,684, so that the value of Yellowstone's property in Montana for tax purposes was determined to be $8,468,250. The Board then subtracted from the full and true value of both systems the value of that property which had been assessed locally. The resulting figure of $3,756,416 for Oil Basin, and $8,164,266 for Yellowstone represents to the Board's mind, the value of each system in Montana, excluding that property which had been locally assessed.

APPORTIONMENT.

Section 84-905 provides: "The Board must assess all the properties described in section 84-901, but franchises granted by the United States must not be assessed, the value of such properties for assessment purposes to be determined upon such factors as the Board shall deem proper.

"On or before the second Monday in July, the Board shall apportion such assessment to the counties in which the properties are situated."

Apportionment, then, means the process by which the Board spreads out the total value of a system among the counties through which the system passes. With respect to both pipe lines here involved, the Board accomplished apportionment by dividing the amount to be apportioned by the miles of pipe. The Board then merely found the number of miles of pipe located in each county and multiplied that figure by the value per mile. In the case of Oil Basin, which has 234.776 miles of 8 inch pipe and property with a total value of $3,756,416, simple arithmetic determined that the pipe would be rated at $16,000 per mile. Since Oil Basin owned 74.374 miles of pipe in Yellowstone County,

that county's share of Oil Basin's property was computed at $1,189,984.

Yellowstone Pipe Line Company was treated similarly, with the exception that it owned three different sizes of pipe. All the pipe was equated to 10 inch pipe and the total unit value allocated to Montana was then apportioned at a fixed rate per mile of pipe. The Board computed that 10 inch pipe would be rated at $18,310 per mile, 8 inch pipe at $16,000 per mile and 4 inch pipe at $7,000 per mile. In Yellowstone County, where Yellowstone owned 22.83 miles of 10 inch pipe, 4.16 miles of 8 inch pipe and 4.20 miles of 4 inch pipe, by applying these rates the county's apportioned share was determined to be $513,978.

In substance the material allegations of *Yellowstone's complaint are:*

(1) That the full value of all its pipe line property in 1955 did not exceed the sum of $4,901,300; that the true and full value of its 10 inch pipe line did not exceed $11,000 per mile; that the full and true value of its 8 inch pipe line did not exceed $9,000 per mile; that the full and true value of its 4 inch pipe line did not exceed $4,000 per mile.

(2) That notwithstanding this fact, the Board wrongfully and unlawfully assessed all the property of the plaintiff at a figure of $8,468,250; that the Board wrongfully and unlawfully purported to assess plaintiff's 10 inch pipe at $18,310 per mile, 8 inch pipe at $16,000 per mile, and its 4 inch pipe at $7,000 per mile.

(3) That the assessed valuation was arbitrary and discriminatory and that such properties were assessed at a value far in excess of that at which similar property of other taxpayers were assessed; that the assessment was arbitrary, discriminatory, capricious and unreasonable in that the Board made the assessment by using a fundamentally wrong principle of assessment and failed and neglected to make such assessment upon competent and substantial evidence of value and based such assessment

on guess, conjecture and surmise; that the valuations are so grossly in excess of true and full value of said property as to be inconsistent with any exercise of honest judgment.

(4) That the Board acted in excess of jurisdiction in purporting to assess property of an oil products pipe line when there is no authority in law.

(5) That the Board wrongfully and unlawfully, and in violation of section 84-301 classified plaintiff's property in Class 7 under said statute instead of under Class 4, which is the proper and lawful classification.

The material allegations of Oil Basin's complaint are of similar import, with the applicable figures changed.

The court made separate findings of fact, and conclusions of law with respect to each Pipe Line Company's case. Yet the findings and conclusions with respect to each plaintiff are of substantially similar import. The substance of these findings which we deem important to set out here with respect to Yellowstone Pipe Line Company are as follows:

(1) That when the State Board assessed plaintiff's property, it knew that real estate in Yellowstone County and throughout the entire State of Montana was systematically assessed by the county assessors at far less than a true and full value, the state-wide average being 30.55 percent of full and true cash value, the average in the thirteen counties through which plaintiff's pine line passed, being 32.57 percent and the average in Yellowstone County being 31.5 percent according to the Seventeenth Biennial Report of the State Board of Equalization for the period beginning July 1, 1954, to June 30, 1956; that the schedules promulgated by the State Board for use by county assessors in assessing certain types of property such as motor vehicles, oil field equipment and supplies, livestock, lumber, neon signs, etc., reflected that such property had been assessed from 50 percent to 70 percent of full cash value; that the schedule which concerned oil field equip-

ment listed pipe lines at the value of $1,000 per inch of diameter per mile, which value, had it been applied to the plaintiff's pipe line would have resulted in an assessment one-half as great as that which was actually made by the Board in 1955.

(2) That the State Board, in 1955, attempted to ascertain the respective unit values of all the properties of the Montana-Dakota Utilities Company by averaging its respective stock and debt values and the respective values obtained by capitalization of the average net operating income for a five-year period; that as to the Montana-Dakota Utilities Company the Board applied an equalization factor of 68.26 percent to its unit value; that the State Board assigned to the 8 inch pipe line of said utility a value of $9,000 per mile; that the Board assessed the oil pipe line of Interstate Pipe Line Company in 1955 by averaging the stock and debt value and the value represented by a five-year average of operating income capitalized at 6 percent; that the Board allocated the Montana portion of Interstate Oil Pipe Line by multiplying the total unit value found as aforesaid by the average of the percentage of gross operating income in Montana to total gross operating income and the percentage of cost of plant in Montana to total cost of plant, and that the State Board then applied an equalization factor of 62.55 percent to reach the assessed value of that pipe line in Montana.

(3) That the valuation placed on plaintiff's property by the Board in the sum of $8,468,250 was arbitrary and discriminatory in that such properties were assessed at a value far in excess of that at which similar properties of other taxpayers were assessed by said Board, and in that such properties were assessed at a valuation grossly in excess of that placed upon other taxable property within Yellowstone County belonging to other taxpayers.

(4) That the allocated value of $18,310 per mile placed on plaintiff's 10 inch pipe was grossly excessive in that said properties were assessed at a greater rate than that

used in the assessment in the same year of similar properties of other companies, for example, $9,504 per mile on the 10 inch pipe of one company, and $11,000 per mile on the 10 inch pipe of another; that the pipe of companies other than plaintiff was assessed at values allocated at the rate of $9,000 per mile for 8 inch pipe, and $4,000 per mile for 4 inch pipe, whereas plaintiff's pipe was assessed at $16,000 per mile for 8 inch pipe and $7,000 per mile for 4 inch pipe.

(5) That the assessed valuation placed on plaintiff's property by the Board was unreasonable, arbitrary and grossly excessive in that the Board in making such assessment followed a fundamentally wrong principle of assessment in intentionally and systematically applying to the true and full value of plaintiff's property, an equalization factor of approximately 74 percent, whereas, it well knew that the county assessors of the thirteen counties wherein plaintiff's property was located, intentionally and systematically have applied an average equalization factor to the true and full value of land improvements of less than 35 percent.

(6) That the equalization factor assigned to plaintiff's property by the Board was so grossly in excess of that percentage to true and full value which had been assigned to property generally by the county assessors of the thirteen counties as to be inconsistent with the exercise of any honest judgment and resulted in a tax that contravenes the provisions of sections 1 and 11 of Article XII of the Constitution of Montana, which requires uniformity in an assessment and taxation and denied to plaintiff the equal protection of the laws in violation of section 27 of Article III of the Constitution of Montana, and the Fourteenth Amendment to the Constitution of the United States.

(7) That the application to plaintiff's property of an equalization factor or assessment ratio of 48 percent of its true and full value as determined by the State Board

of Equalization will result in an assessed valuation higher than that placed by said State Board on other like properties (excepting the property of Oil Basin Pipe Line Company), but that said equalization factor or assessment ratio of 48 percent will effect a substantially uniform rate of assessment, and that said equalization factor or assessment ratio of 48 percent is eminently just and reasonable; that plaintiff's property assessed by the State Board of Equalization should not have been assessed by said State Board at more than $5,345,616 and the assessed value of plaintiff's pipe line property in Yellowstone County, Montana, for the year 1955 should not have exceeded $333,300.

(8) That the State Board classified the pipe line property of the plaintiff in the amount of $8,164,260 as property in Class 7 under sections 84-301 and 84-302.

'The court's findings with respect to Oil Basin Pipe Line Company were substantially the same as those heretofore set out with the exception of the following:

(1) The court found that the assessed valuation of Oil Basin's property of $3,756,416 was arbitrary and discriminatory; that the assessed valuation of $16,000 per mile placed upon the property of Oil Basin by the Board was grossly excessive in that such properties were assessed at a value in excess of that which other similar properties were assessed, i.e., $9,000 per mile; that the Board followed a fundamentally wrong principle of assessment in intentionally and systematically applying an equalization factor of approximately 76 percent to the full and true value of Oil Basin's property to arrive at the assessed value when the Board knew that the county assessors of the six counties wherein Oil Basin's property was located had intentionally and systematically applied an equalization factor of 37 percent to the true and full value of lands and improvements assessed by them to reach the assessed value; that Oil Basin's property should not have been assessed by the Board at more than $2,347,760, and that

the assessed value of Oil Basin's pipe line property in Yellowstone County should not have exceeded $743,740.

At the outset it is apparent that the judgments below are in themselves inconsistent. It was held in each case that the properties of respondents were correctly classified as Class 7 property within the meaning of section 84-301, R.C.M. 1947. But it was also held in each case that the assessments were void because, essentially, they were discriminatory and caused respondents' properties to be placed on the tax rolls at a higher percentage of full and true value than were *land and improvements*, which were placed on the rolls at less than 35 percent of full and true value, and thus are in contravention of the requirements of uniformity in assessment and taxation as provided for in sections 1 and 11 of Article XII of the Montana Constitution.

It is contended most strongly on this appeal that the application of different equalization factors during the process of assessment to the properties of respondents is a violation of the requirement of uniformity as set out in sections 1 and 11 of Article XII of the Montana Constitution and a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

Section 1 of Article XII provides:

"The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upor corporations doing business in the state."

Section 11 of Article XII provides:

"Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

Respondents have cited many cases from other jurisdictions to support their contention. But it must be remembered that it is the Constitution of Montana which is controlling here, and its interpretation is for this court. Interpretation of other state constitutions are not binding upon us in the interpretations of our own Constitution. We may, of course, look to others for guidance, but ours is unique, and our word is final on its meaning.

We have here the duty of construing the meaning of uniformity as set forth in these sections. At the outset, some aspects must be noted which reflect the differences between our Constitution and those of other states. The rule of uniform taxation *according to value* does not prevail in Montana. Property with the same value, but of different character, need not be taxed the same. Hilger v. Moore, supra. The purpose of the classification statute, as stated in the Hilger case at p. 178, is "to shift the burden of taxes from property, as such, to productivity, or, in other words, to impose the burdens of government upon property in proportion to its use, its productivity, its utility, its general setting in the economic organization of society, so that everyone will be called upon to contribute according to his ability to bear the burdens, or as nearly so as may be, and to relieve administrative officers from the apparent necessity of continuing the legal fiction of full valuation in the face of contrary facts."

The many cases from other jurisdictions pressed upon us here are of no more use to us than those presented to the court in the Hilger case. In this respect the court at p. 172 there said:

"Decided cases almost without number have been pressed upon our attention, but they are practically without value in this instance. They construe constitutional provisions altogether unlike our own. Indeed, no other state in the Union has provisions in its Constitution similar to those of ours enumerated above. Some of these may be found in the Constitution of one state; some in another:

some of them cannot be found in the Constitution of any other state. A review of these authorities would be a work of supererogation."

The Hilger case remains in full force and effect today, and was recently affirmed in Victor Chemical Co. v. Silver Bow County, 130 Mont. 308, 301 P. 2d 730.

Nor can the interpretation of the Montana Constitution as stated in Hilger v. Moore, supra, be attacked on the ground that it violates the Equal Protection Clause of the Fourteenth Amendment.

The case of Greene v. Louisville & I.R. Co., 244 U.S. 499, is heavily relied upon by respondents. In that case the United States Supreme Court was construing the Arkansas Constitution which required, at that time, uniformity of taxation *according to value*, which does not obtain in Montana. And the Supreme Court has subsequently stated that such uniformity restrictions are not to be considered as required by the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. In Nashville, C. & St. Louis Ry. v. Browning, 310 U.S. 362, 368, in referring to the Greene case, the court stated:

"This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that *their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure.* See Puget Sound Co. v. King County, 264 U.S. 22, 27." Emphasis supplied.

Similarly, the case of Taylor v. Louisville to Nashville R.R. Co., 88 Fed. 350, which is cited in the Greene case, involves an interpretation of the Tennessee Constitution which, at that time, required uniformity in taxation in proportion to value, hence, is inapplicable here.

Respondents also cite Raymond v. Chicago Traction Co., 207 U.S. 20; Sunday Lake Iron Co. v. Wakefield,

247 U.S. 350; Sioux City Bridge v. Dakota County, 260 U.S. 441; Bohler Callaway, 267 U.S. 479. But in the Nashville case, supra, the court stated, with reference to these same cases: "None denied power to a state to apply different yardsticks to different classes of property."

Respondents cite In re Farmer's Appeal, 80 Idaho 72, 325 P. 2d 278; McCluskey v. Sparks, 80 Ariz. 15, 291 P. 2d 791, Booneville Natl. Bank v. Schlotzhauer, 317 Mo. 1298, 298 S.W. 732, as arising in states having a state constitutional provision identical with section 11, Article XII of our Constitution.

The Idaho Constitution, considered in In re Farmer's Appeal, supra, does contain a provision in section 5, Article 7 which is similar to section 11, Article XII of our Constitution. But that Constitution does not contain any provision relating to the power of a state board of equalization to adjust and equalize between the classes of property, nor does it contain any express grant such as is found in section 15 of Article XII of the Montana Constitution. Furthermore, the Idaho Constitution contains a provision in section 2 of Article 7, that every person or corporation shall pay a tax in proportion to the value of his, or its property. The Idaho Constitution is substantially different than ours, hence, that case is no authority here.

In McCluskey v. Sparks, supra, an Arizona case where an appeal from a dismissal was before the court, it was stated:

"Deliberate and systematic undervaluation of plaintiffs' property at a figure greatly in excess of the undervaluation of other *like properties* amounts to a violation of the Arizona Constitution, article 9, section 1, which requires that all taxes 'shall be uniform upon the same class of property within the territorial limits of the authority levying the tax * * *'." (Emphasis supplied.) This case is no authority for the contention that a difference in the valuation between *unlike* properties is a violation

of such a provision, which is the crux of respondents' claim here.

Booneville Natl. Bank v. Schlotzhauer, supra, a Missouri case, is likewise no authority here. At the time it was decided, the Missouri Constitution provided, in section 4, of article X:

"All property subject to taxation shall be taxed in proportion to its value." And the Missouri court construed the provision to prohibit classification. It said:

"We have ruled that Section 4, of Article X of the Constitution makes but one class of taxable property."

The question now becomes, can our Constitution be construed to permit the state board of equalization to give special treatment to similar properties, i.e., utilities and pipe line companies, which may result in a higher assessment with relation to true and full value, than that applied to dissimilar property, i.e., town and city lots, with a different character and productivity. If our Constitution is properly so construed, there is no discrimination in violation of the 14th Amendment. In Nashville, C. and St. Louis Ry. v. Browning, 310 U.S. 362, 368, supra, the Supreme Court said:

"That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate these—are among the commonplace of taxation and of constitutional law. Kentucky Railroad Tax Cases, 115 U.S. 321; Pacific Express Co. v. Seibert, 142 U.S. 339; Florida Central & P. R. Co. v. Reynolds, 183 U.S. 471; Southern Ry. Co. v. Watts, 260 U.S. 519; Atlantic Coast Line v. Daughton, 262 U.S. 413; Rapid Transit Corp. v. New York, 303 U.S. 573. Since, so far as the Federal Constitution is concerned, a state can put rail-

road property into one pigeon-hole and other property into another, the only question relevant for us is whether the state has done so. If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment."

Reference should be made to State v. Alabama Power Co., 254 Ala. 327, 48 So. 2d 445, cited by respondents. In that case a public utility, the Alabama Power Company, protested the assessment of its property at 60 percent of taxable value while other property was assessed at not over 40 percent. The very question of whether the state constitution allowed this separate classification was presented. In holding that the Alabama Constitution did not allow classification, the Alabama court expressly recognized that in some states the constitutions authorize such classification and that no violation of the Fourteenth Amendment results. Hilger v. Moore, 56 Mont. 146, supra, has settled this question in Montana contrary to the position in Alabama, hence, this case is no authority here. It is helpful, however, in disposing of respondents' argument with respect to the Fourteenth Amendment.

Sections 1 and 11, of Article XII were a part of the Constitution of Montana as ratified by the people on October 1, 1889. Sections 1 and 11 must be construed together with section 15, which refers specifically to the state board of equalization. *Section 15* of Article XII, was first amended by Chapter 47, Laws of 1915, as later approved by the people in November 1916, effective on the governor's proclamation of December 4, 1916. Pursuant to that Constitutional amendment, the state board of equalization was, for the first time, specifically given the power to "*adjust and equalize the valuation of taxable property among the several Counties and the different classes of*

taxable property in the same and in the several counties and between individual taxpayers; supervise and review the acts of County Assessors and County Boards of Equalization; change, increase or decrease valuations made by County Assessors or equalized by County Boards of equalization and has such authority and *may do all things necessary to secure a fair, just and equitable valuation of taxable property among the Counties and between the different classes of property and individuals.*" (Emphasis supplied.)

It was not until 1919 that the classification statute was enacted in section 1, Chapter 51, Laws of 1919. Consequently, before any legislative classification existed, the state board had the power to adjust and equalize valuations among the different classes of property and to do all things necessary to secure a fair, just and equitable valuation between the different classes of property. This necessarily included the power to determine, in the first instance, just what property *belongs* in the same *class.*

Section 15 of Article XII was later amended by Chapter 11, Extra. Session Laws of 1921, as adopted by the people in 1922 and effective under the governor's proclamation of December 14, 1922. By virtue of this amendment, the board's power was transformed to a duty. The amendment provides in part: "The state board of equalization *shall* adjust and equalize the valuation of taxable property among the several counties, and the different classes of taxable property in any county and in the several counties and between individual taxpayers; supervise and review the acts of the county assessors and county boards of equalization; change, increase or decrease valuations made by county assessors or equalized by county boards of equalization; and exercise such authority and do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, between the different classes of property, and between individual taxpayers."

Once it is seen that the Board had the constitutional power to classify property itself, even before the enactment

of the classification statute, can it be said that the classification statute *limited* that constitutional power to classify propery as the needs of a dynamic and progressive economy multiplied so as to promulgate the constitutional intent to spread the burdens of taxation among those who best can bear it according to the productivity of their property? As long as the Board treats property of similar nature and productivity the same, can it be said that the constitutional mandate of uniformity is not subserved? We do not think so.

The power granted the Board by the constitutional amendment to Sec. 15, Article XII, to "adjust and equalize the valuation of taxable property *among the several counties, and the different classes of property*" and to 'do all things necessary to secure a fair, just and equitable valuation of all taxable property among counties, *between the different classes of property*" necessarily included the power to determine what a particular class should include. The legislative enactment of 1919, of what is now section 84-301, did not and could not limit that power. Section 84-301 is patently broad in its terms. Class 4 includes "All land, town and city lots, with improvements, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the constitution of Montana, and except as such property may be included in Class 5."

Under the Constitution, the Board has the power, in adjusting and equalizing taxation between oil pipe lines and other properties, i.e., town and city lots, to recognize pipe lines as a *class* in itself, and still not violate the requirement of uniformity.

The issues to be decided here, therefore, can be resolved to these:

(1) Is there any substantial evidence to support a finding that the Board utilized a fundamentally wrong principle of *assessment* or made an error so gross as to be inconsistent with any exercise of honest judgment?

(2) , Is respondents' property properly classified as Class 7 property under section 84-301, R.C.M. 1947?

We shall consider this second issue first. As noted earlier, the district court held that respondents' properties were correctly classified in Class 7 which includes "all property not included in the six preceding classes." As Class 7 property, 40 percent of its value was computed as the basis for the imposition of taxes, pursuant to section 84-302, R.C.M. 1947. Respondents claim it is properly Class 4 property and subject to taxation to the extent of only 30 percent of its value, pursuant to section 84-302. Class 4 property includes "All land, town and city lots, with improvements, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the Constitution of Montana, and except as such property may be included in Class Five."

It was stipulated at the trial that respondents' pipe lines are imbedded in real estate rights-of-way, obtained from the record owners of the fee by written conveyances.

The Board argues that the pipe lines do not improve the real estate, serve no purpose on the land, do not enhance the value of the real estate and may be removed at the pleasure of the respondents.

The respondents argue that their rights-of-way, as easements, are interests in land and that the pipe lines, since they are affixed thereto, are properly termed fixtures or improvements.

Section 67-207, R.C.M. 1947, defines real property as:

"1. Land;

"2. That which is affixed to land;

"3. That which is incidental or appurtenant to land;

"4. That which is immovable by law."

Section 67-209, R.C.M. 1947, provides:

"A thing is deemed to be affixed to land when it is

attached to it by its roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws."

In construing these two statutes, this court said in Montana Electric Co. v. Northern Valley Mining Co., 51 Mont. 266, 271, 153 P. 1017: "These provisions are identical with like provisions found in the Civil Code of California since 1872, and, with the exception of section 4428 [now R.C.M. 1947, § 67-210], were copied from the proposed draft of a Civil Code prepared for the State of New York by David Dudley Field and his collaborators. The purpose of the Code was not to introduce new rules or definitions into the law, but rather to reduce to concise form the rules of law as they were then recognized and applied by the courts. Reference to New York and California decisions aids in determining the scope which the provisions of our Code above, were intended to have, and from those decisions we deduce the following: (1) Whether what would otherwise be personal property has become a fixture by reason of its attachment to the soil, is primarily a question of intention on the part of the person attaching it; (2) the attachment in the manner indicated in our Code sections above, raises a presumption that the one who made the attachment intended the thing affixed to become a part of the realty; this presumption, however, is a disputable one; (3) as a general rule, the manner in which the attachment is made, the adaptability of the thing attached to the use to which the realty is applied, and the intention of the one making the attachment, determine whether the thing attached is realty or personality. [Citing cases.]"

In considering whether poles of an electric railway line were improvements this court has stated:

"That the poles are not improvements upon the street surely is patent, unless it may be said that they are fix-

tures. While a thing imbedded in the soil, a pole, ordinarily is a fixture (sec. 6669, Rev. Codes 1921 [now R.C.M. 1947, § 67-209]), certain tests are employed to ascertain whether as a fact, an article attached to the realty is a fixture. Two of the tests are, the use or purpose of the annexation, which is entitled to much weight, and intention of the party making the annexation, which is generally held to be the chief test. It is said that if property is placed on land to improve it and make it more valuable it is generally deemed a fixture, but if attached for a use which does not enhance the value of the land it remains a chattel. The intention to make an article a permanent accession to the realty must affirmatively and plainly appear; if the matter is left in doubt and uncertainty the legal qualities of the article are not changed, and it must be deemed a chattel. (11 R.C.L. 1061-2). By placing the poles in the streets and roads the plaintiff did so for the purpose of transmitting power to its cars. The poles are accessory to its business not to the soil in which they stand." Butte Electric Ry. v. Brett, 80 Mont. 12, 17, 257 P. 478.

Considering then the rules as established by the foregoing authorities, can it be said that the intention of the respondents in placing the pipe in the ground was to make the pipe a permanent part of the realty? They have the right to remove their pipe, and common sense tells us that if the operation were unprofitable they would certainly salvage their pipe. What adaptability of the pipe lines imbedded in the ground exists to the use to which the realty is applied? In our view, the ground is only a foundation upon which the pipes can rest. The line could as easily lie on top of the ground were it not for the maintenance problem brought on by its exposed position and the difficulty of crossing natural and man-made obstructions. Does the pipe line improve the land and make it more valuable? To the contrary the land makes the pipe line more valuable since it removes it from danger of damage were it exposed.

To what purpose is the pipe line put? It is used for the transportation of petroleum products and, in our opinion, such use bears no relationship whatever to the use of the realty. There can exist here no presumption that respondents intended the pipe to become a part of the realty because the evidence is conclusive that they had no such intention.

While respondents rely upon State ex rel. Northern Pacific Ry. Co. v. Duncan, 68 Mont. 420, 210 P. 638, as supporting their position, that case is clearly distinguishable because it involved improvements located upon the railway right-of-way.

From what has been heretofore said, in our opinion, a pipe line is not a fixture and thus cannot be considered an improvement.

The State Board correctly classified the pipe line in Class 7 of section 84-301.

Turning then to the first issue as heretofore set forth, there exist well-defined principles which serve to guide the review of a decision of the Board of Equalization. It must be borne in mind, that in this discussion we are speaking of the propriety of the method of *assessment* by the Board, as that term has been heretofore defined.

In the recent case of Treasure State Pipe Line Co. v. County of Toole (Mont. 1959), 345 P. 2d 162, 164, we said:

"In dealing with plaintiff's contention it may be well to preface our discussion with certain rules and principles with respect to assessment valuations which are well-established in this state. In the early case of Danforth v. Livingston, 23 Mont. 558, 562, 59 P. 916, this court said: ' * * * under the great weight of authority, courts will ordinarily not interfere with the action of these officers [assessing officers] to correct mere errors of judgment. It is only where they act fraudulently or maliciously, or the error or mistake is so gross as to be inconsistent with any exercise of honest judgment, that courts will grant relief.

* * * Under the authorities cited, this fact [overvaluation], standing alone, is not sufficient to warrant the relief sought. There is not such an excess in the valuation as to justify a conclusive presumption of fraud or malice on the part of the assessing officer. The value of property is a matter of opinion, and there must necessarily be left a wide room for the exercise of this opinion. Absolute accuracy cannot always be attained. Courts cannot be called upon, in every instance, to settle differences of opinion in this regard between the assessing officer and the property owner. Otherwise, courts would be converted into assessing boards, and, in assuming to act as such, would usurp the powers lodged elsewhere by the lawmaking branch of the government.' * * *

"In State v. State Board of Equalization, 56 Mont. 413, 448, 185 P. 708, 186 P. 697, this court said further: ' * * * in so far as the means to be adopted by them [State Board of Equalization] in arriving at values are concerned, we may not interfere. Those matters are within the discretion of the board, and so long as they are not guilty of fraud, and do not adopt a fundamentally wrong principle of assessment, we cannot interpose, or substitute our judgment for theirs.' "

Is there any substantial evidence here to sustain a finding that the Board acted fraudulently or maliciously, pursued a fundamentally wrong principle of assessment, or committed an error so gross as to be inconsistent with any honest judgment? The evidence relied upon most strongly by respondents is that the per-mile rate placed on the pipe lines of respondents exceeds the rates placed on similar properties, and that no inflexible formula was used in arriving at the unit value of each of their properties.

But the fixing of per-mile rates by the Board is only an artificial method of *apportionment*, as hereinbefore described. Divergence in these figures proves only that the unit values of the compared Companies are different or that the mileage of their pipe lines is different. It does *not*

prove that the method of *assessment* employed in determining the unit values of respondents' property is fundamentally wrong or excessive.

The evidence presented below was voluminous concerning the exact method the Board used in finding the unit value of not only respondents' properties, but with respect to the assessment of similar property. There is not any substantial evidence to support a finding that either the use of the unit rule of valuation, or the use of the stock and bond-income-cost method of valuation resulted in an excessive assessment or is *fundamentally* wrong.

It must be remembered that the Yellowstone Pipe Line Company contended here that the full value of all its pipe line property in 1955 did not exceed the sum of $4,901,300. Their annual report disclosed that this company had invested $17,158,023.42 in its Montana pipe line system. For rate-making purposes the Interstate Commerce Commission had placed a value of $15,683,844.79 upon the Montana portion of its system. The state board arrived at an assessed value upon its Montana system of $8,468,250.00. In view of these comparisons it must be conceded that the final valuation figure, rather than the individual factors used to arrive at it, do not reflect an excessive assessment as contended. The fact that no inflexible formula was used in assessing all systems in exactly the same manner does not prove that the Board was wrong. Flexibility should be a virtue, with respect to taxation, not a vice.

There is evidence herein which indicates that a different percentage "equalization factor" was applied to the properties of other utilities in 1955, and the court so found. In view of the general asssesment situation existing today in Montana, and in view of the Board's policy of attempting to bring all assessments up to the statutory requirement of full cash value, and to equalize among the counties, we do not think that such divergencies in equalization show such discrimination as is forbidden by the Constitution. Perfect uniformity in taxation can never be achieved, and

as long as substantially the same proportion of the same type of property is subjected to taxation, the courts will not interfere. Taxation is a complex and difficult aspect of the law to administer, and as long as those entrusted with this duty by the people are proceeding in good faith and in a reasonable and just manner, as the State Board has been shown to have acted here, and no substantial discrimination results, it would be an unwarranted interference with the executive branch of the government for the judiciary to substitute their judgment for that of the Board.

Except for that portion correctly holding that respondents' pipe lines should be classified in Class 7 of section 84-301, R.C.M. 1947, the judgments of the district court are reversed and set aside, and the cause remanded to the district court with instructions to make and enter judgments herein in favor of the appellant and against each respondent consistent with the views expressed in this opinion. Each party to bear their own costs on this appeal.

JAMES T. HARRISON,
Chief Justice

We concur:

ALBERT H. ANGSTMAN,
WESLEY CASTLES,
Associate Justices

LESTER H. LOBLE,
District Judge Lester H. Loble,
sitting in place of
Mr. Justice Bottomly.

Mr. Justice Adair dissenting:
I dissent.

Two important questions are presented on this appeal. The first concerns the validity of the assessment of these particular Pipe Line Companies by the State Board of Equalization.

The second concerns the validity of the equalization process employed by the State Board of Equalization to arrive at the taxable value of such Pipe Line Companies before classification.

The Assessment. Assessment of intercounty pipe lines is a responsibility of the State Board of Equalization. The statute, R.C.M. 1947, § 84-905, provides that these pipe lines and other intercounty utilities are to be assessed by the State Board of Equalization and not by the county assessors.

The standard of value supplied in R.C.M. 1947, § 84-401, provides:

"All taxable property must be assessed at its full cash value. * * * "

This statutory standard controls all assessments regardless of who makes the assessment. In assuming to perform its statutory duties of assessing these intercounty Pipe Line Companies the State Board of Equalization adopted what it terms a *unit method* of assessment. In following this method and in assessing, pursuant to such unit method, the Board should have determined a value according to three following factors, viz:

(1) Stock and debt value, (2) plant and equipment value, and (3) capitalized earnings value.

The application of this *unit method* of assessment may be demonstrated by setting out the actual assessment procedure employed by the Board.

Yellowstone Pipe Line. The Board's procedure in assessing the Yellowstone Pipe Line was as follows:

Stock and Bond Value	
Common Stock	4,100,000.00
Notes	16,400,000.00
	20,500,000.00
Adjustment	6,813,950.00
	13,686,150.00
Capitalization Value	
Income for 4 months	137,446.00
Projected for 12 months	412,338.00
Capitalized at 6%	6,872,300.00
Cost of Plant and Equipment	19,607,792.00

These factors were then totaled as follows:

	13,686,150.00
	6,872,300.00
	19,607,792.00
And divided by 3	40,166,242.00
equaling	13,388,747.00

An allocation factor for Montana operations of 85 percent was then applied and the assessed value of the Yellowstone Pipe Line in Montana was arrived at being, $11,440,684.00.

Oil Basin Pipe Line. In assessing the Oil Basin Pipe Line, the Board's procedure was as follows:

Stock and Bond Value	
First Mortgage Bonds	3,600,000.00
First Mortgage Bonds due in one year $300,000.00. These not considered since due in one year.	
Sinking fund debentures	1,360,000.00

this court will not assess we must determine whether the assessment was honestly and lawfully made. If found not to be an honest and lawful assessment then it becomes this court's duty to point out the defects in the assessing procedure employed, and return the cause to the trial court for further proceedings that shall conform to the law.

The assessments of these properties by the Board was improper, illegal and designed to fix a fictitious value and to understate the value of these pine line properties, rather than to ascertain, set out and determine the full cash value as provided by law. Clearly the Board's assessment does not constitute an honest assessment.

Inter-county Assessment. In assessing inter-county properties of the two Pipe Line Companies, the Board seeks to assess the value of the properties as going businesses. The value of the business as a whole, as distinguished from the value of the component parts, is what is sought to be assessed. The *unit method* of assessment seeks to find that business value. As heretofore set forth, the *unit method* combines various factors which in themselves are combinations of various types of property such as real property, personal property, cash, credits, etc., and the final average value determined by the Board becomes a combination of all such factors, hence, the average value determined can only be classified as Class Seven or "All property not included in the six preceding classes" of R.C.M. 1947, § 84-301.

The second question presented concerns what the State Board terms its "equalization process". What this involves is best illustrated by reviewing the procedure adopted following the ascertaining of the value of these properties.

Having determined, in the case of Yellowstone Pipe Line, that the property had the value of $11,440,684, the Board then applied what it termed "an equalization factor" of *74.02 percent* of the $11,440,684 value and by this method arrived at another value of but $8,468,250, which

latter sum then constitutes the value before classification against which such taxes were to be levied.

In the case of Oil Basin Pipe Line, however, after the Board had determined a property value of $5,072,908, the Board then applied a different "equalization factor" amounting to over 76 percent of the $5,072,908, and by this different method arrived at another value of but $3,856,166 which latter sum then constitutes the value before classification against which taxes were to be levied.

In addition to the above-outlined procedure employed by the Board, evidence was presented at the trial which showed that certain other similarly classified property had been given an "equalization factor" by the Board of 62 percent of its property value as fixed by the Board. These arbitrary percentage figures represent the proportion of the value found and determined by the Board, and which the Board considers it must take into account for tax purposes in order to provide uniformity between the classes of the various kinds of property in the state.

The question of whether or not the equalized value as between properties of different classes must be uniform to comply with Article XII, §§ 1 and 11, of the Montana Constitution, is not presented on this appeal. However, it is quite apparent that Montana's Constitution requires that property of the *same class must* be taxed uniformly. While a difference of but 3.8 percent may not appear significant to some yet this shows discrimination and inequality and is therefore violative of the mandates of the Montana Constitution which require uniformity.

While assessors and assessing bodies are accorded a great deal of latitude in arriving at *assessed* values, and while such assessed values ordinarily will not be disturbed by this court on appeal where it appears the assessment is honestly made, yet where it appears the assessed value has been determined and thereafter only an arbitrary percentage of such assessed value is to be subject to tax, then

Common Stock 350,000 shares at 1 cent par. Taken at actual value as distinguished from market value given in evidence as 1,750,000.00	70,400.00
	5,030,400.00
Value of Plant & Equipment	5,115,416.00

No capitalized value for the reason that company had only been operating 6 weeks

These figures were then totaled with this result:

	5,030,400.00
	5,115,416.00
and divided by 2	10,145,816.00
equaling	5,072,908.00

From the above, the Board determined the assessed value of the Oil Basin Pipe Line to be $5,072,908.00.

The right to use the *unit method* is not here questioned. The *unit method*, combining as it does the three factors above enumerated when *properly used*, constitutes an honest method of valuing property for tax assessment purposes and I find no evidence in this case tending to show the method here used by the Board, overvalued any of the properties here involved. However, attention must be directed to the fact the Board did not make *proper* use of the *unit method* with the attendant result that these pipe line properties were grossly *under assessed*. This, for the reason that the so-called *unit method* of assessment attempts to combine and reach an average value by employment of three distinct valuation procedures. The averaging of these values so obtained by three separate methods is for the purpose of putting within a proper prospective the respective valuations. However, the valuations to be averaged must, of necessity, be the fair and correct valuation obtained under the proper valuation procedure. It is improper to tamper with any of the valuation procedures.

If the values are determined separately under all three methods, and then an average obtained, a value will be arrived at which most closely reflects the fairest assessed value sought to be determined under the applicable tax statute. With this in mind, it is obvious that the use of the *unit method* forecloses the assessing body from *juggling* the values which are to be averaged. The *unit method* as such is designed to level out the disproportionate valuations if any exist, yet what the Board did here was to render ineffective the procedure adopted.

The assessment by the Board, as set out here, is not a *unit value* assessment at all because the Board deliberately misstated the values of the factors to be *averaged*. The Board discriminated *in favor of the taxpayer*, and did not make a valid and honest assessment. An examination of the Board's assessment clearly demonstrates this.

Yellowstone Pipe Line's stock and debt value was $20,500,000.00. *It was not anything less than that figure.* Yet the Board subtracted $6,813,850.00 in value from actual stock and bond valuation. The adjustment of over 6.8 million dollars is improper and illegal under the *unit method* and amounts to an abandonment by the Board of the *unit method* as a means of assessing the property. While the Board attempts to excuse this illegal adjustment by urging the line had been built over difficult terrain, yet the Board ignores the fact that actually the line being built over and through such difficult terrain gave and gives the Pipe Line Company a competitive advantage worth far more in *actual value* than the additional cost of construction which the difficult terrain entailed. If this additional cost were disproportionate, the averaging of all the factors was designed to put it in its proper perspective. The action of the Board in distorting the factor of the stock and bond value of the Yellowstone Pipe Line Company destroys the validity of the Board's assessment. When the Board thus *edits* the factors to be used in the assessing formula then the assessment thereafter found is not an honest and legal assessment.

The Board, in assessing this property, was not merely trying to arrive at a correct assessment, but it sought and made an under assessment. While the Board asserts it was using a *unit method* of valuation, in truth and in fact, it was so juggling the essential factors of the method as to forsake and abandon the method itself. Such juggling is further apparent in the Yellowstone Pipe Line assessment when the capitalized valuation which the Board used as a factor is examined. The Board took the earnings of the Company for its initial 90-day period, but it never examined such earnings to ascertain whether they represented maximum possible earnings or partial use earnings. Next, the Board projected these 90-day earnings to represent a years earnings at the same rate. In so doing, the Board was *not assessing but merely guessing.* The Board then capitalized these earnings at a 6 percent figure without a scintilla of evidence that such percentage is or ever would be the rate of return to the Company. Again, this is but a mere guess, not an assessment. The assessment of Yellowstone Pipe Line was not either an honest or legal assessment.

What then did the Board do in assessing the Oil Basin Pipe Line? In this particular assessment, the Board considered *only two factors.*

No capitalized value was set out for Oil Basin Pipe Line for the reason that such Company had been operating but six weeks prior to the time of the assessment. Accordingly, the capitalization value factor was considered too uncertain to be a valid criteria of value. Here again, however, the Board was not content to let its adopted valuation procedures alone determine the level of assessment, but felt it had to help such figures along. To accomplish this the Board first understated the stock and bond values in the amount of $300,000. It asserts that this was done because the bonds in that amount would soon be due and payable. This procedure is similar to deducting a short term mortgage from the value of property which of course

is highly improper. For example, if a person were to buy a house for $11,000, paying $1,000 in cash and giving a $10,000 mortgage for one year, the value of the house would nevertheless be and remain at $11,000.

Under the Board's procedure, however, the assessed value would be only $1,000, as the Board would subtract from the actual price paid the amount of the short term mortgage of $10,000. Next the Board juggled the value of the common stock of the Oil Basin Pipe Line Company. In its report to the State Board of Equalization the Oil Basin Pipe Line Company submitted three separate values which it had placed on its common stock. Par value, the Company stated to be one cent a share. Actual value the Company stated to be $70,400. Market value the Company stated to be $1,750,000.

The evidence given by a witness for the Board explaining how the stock value to be used by the Board was selected is most enlightening. When questioned about values selected by the Board, the witness testified:

"Q. And in the case of Plaintiff's Exhibit 7, which is the Oil Basin, you used *actual* value? A. In that year they did, and I can't tell you why because apparently if they used market value it would have given a terrific value of $1,750,000 and it would be my opinion, and I think it was the Board's opinion that that was a little bit out of line."

In setting out the patent flaws in the Board's assessment of these properties it is not my purpose to usurp the function of the Board or to assess the property. We fully appreciate that decisions of this court hold it is not within this court's power to perform the assessing functions given to the Board. Nevertheless, the question is presented here as to whether the method of assessment adopted and employed by the Board constituted an "honest and lawful" assessment and, on this appeal, it becomes this court's duty to examine the assessment procedure used by the Board and to answer the question so posed by the appeal. While

and in such event the arbitrarily selected percentage must be identical for all taxpayers of the same class.

In view of this court's recent decision in Yellowstone Bank v. Stillwater County, ... Mont. ....., ... P. 2d ....., 17 St. Rep. 369, upholding as valid, discriminations made as to taxpayers of the same class, we shall here consider only whether or not the type of discrimination here shown is violative of the Fourteenth Amendment to the Constitution of the United States. At the outset the remedy available to these taxpayers because of the patent discrimination here disclosed is not affected by the fact that this property is not taxed at 100 percent of its assessed value.

In Sioux City Bridge v. Dakota County (1923), 260 U.S. 441, 43 Sup. Ct. 190, 67 L. Ed. 340, there was a discriminatory assessment which exceeded the assessed value of other properties. As a justification for such unequal assessment, it was contended that the complaining taxpayer's only remedy was petition to have the lower assessments brought up to his own level. As to such contention, the Supreme Court of the United States said: "The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 percent of the value of their property in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage in violation of the law, has been often dealt with by courts and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the federal courts in the enforcement of the uniformity clauses of state statutes and constitutions and of the Equal Protection Clause of the Fourteenth Amendment. The exact question was considered at length by the Circuit Court of Appeals of the Sixth Circuit in the case of Taylor v. Louisville & Nashville R. R. Co., 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this Court in Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 516, 517, 518. The conclu-

sion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. This court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

It is obvious then that these taxpayers, who have shown that discrimination and inequality exist, as between themselves, and as between themselves and other members of the same class, have the right to have their assessment reduced to the percentage corresponding to the lowest percentage of assessment value assigned to any other member of the same class to the end that the just and ultimate purpose of the uniformity law shall be accomplished and maintained.

The question remaining is this: Does the record herein disclose a discrimination that is prohibited by law?

As heretofore shown, the employment of an arbitrary equalizing percentage is not an assessing procedure, hence, the assessing body when equalizing does not enjoy the same latitude as when assessing property.

In the instant case, after the assessed value had been determined all that was then required to equalize was to employ the same percentage factor against such assessed value found as had been applied to the other taxpayers of the same class. However this was not done. Here the equalizing percentages employed were different for practically every taxpayer within the class. It is obvious that

such discrimination was intentional and systematic and that the employment of these equalizing factors by no stretch of the imagination may be said to have been errors in judgment made while using a valid and uniform method.

The situation, here presented, is controlled by Cumberland Coal Co. v. Board, 284 U.S. 23, 52 Sup. Ct. 48, 76 L. Ed. 146, wherein uniform coal bodies were assessed at uniform values notwithstanding the fact that certain of the coal bodies, because of location near a river were more accessible to transportation, and thus more valuable than those at more remote distances from the river and wherein the court said:

"It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. Sunday Lake Iron Co. v. Wakefield, supra; Sioux City Bridge Co. v. Dakota County, supra; Raymond v. Chicago Union Traction Co., supra; Chicago Great Western Ry. Co. v. Kendall, supra. In Sioux City Bridge Co. v. Dakota County, supra, at p. 446, this court, referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: 'This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.'

"In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded

as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as, for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. If the Commissioners, in the instant case, had taken the basis of one hundred per cent instead of fifty per cent of the assigned values, but had adopted the same method of assessment by which all the coal in a township (aside from active coal) was assessed at the same value an acre, despite well known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at one hundred per cent of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than one hundred per cent. The discrimination is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of fifty per cent of assigned values and differences in actual values are deliberately and systematically disregarded. The undervalued property is in effect valued at less than fifty per cent of its actual value; for example, coal of the same description worth twice as much as that of the Cumberland Coal Company was really valued at twenty-five per cent of its actual value.

"The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district."

In the instant appeal, this court has before it the same type of systematic, intentional discrimination by the employment of different so-called equalizing percentages of the assessed values to like properties of the same class, for the purpose of levying the tax. Such obvious discrimination and inequality clearly violates the Fourteenth Amendment of the Constitution of the United States.

In disposing of this appeal, I would enter an order directing the State Board of Equalization to reassess these properties in conformity with the law as above-stated to the end that uniformity and equality be achieved and maintained as is required by our Constitutions, both State and Federal.

HUGH ADAIR,
Associate Justice

APPENDIX B

JUDGMENTS

(Title of Court and Cause)

JUDGMENT OF THE SUPREME COURT OF MONTANA

The Chief Justice of the Supreme Court of the State of Montana:

To the Honorable Judge of the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone, Greeting:

WHEREAS, In the said District Court in a cause between YELLOWSTONE PIPE LINE CO., A Delaware Corporation, and OIL BASIN PIPE LINE CO., A Delaware Corporation, Plaintiffs and Respondents and Cross-Appellants and State Board of Equalization of the State of Montana, et al., Defendants and Appellants and Cross Respondents wherein the Judgments of the said District Court, entered in said cause on the 10th and 13th days of March, A.D. 1959, was in favor of the said Defendants and Appellants and Cross-Respondents and against the said Plaintiffs and Respondents and Cross-Appellants as by the inspection of the transcript of the record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

AND WHEREAS, in the October term of court in the year of our Lord, one thousand nine hundred and sixty said cause came on to be heard before said Supreme Court and was argued by counsel.

WHEREUPON, On consideration, it is now here ordered and adjudged by this Court that the Judgments of the Court below, entered in this cause on the 10th and

13th days of March, A.D. 1959. Except for that portion correctly holding that respondents' pipe lines should be classified in Class 7 of section 84-301, R.C.M. 1947, the judgments of the district court are reversed and set aside, and the cause remanded to the district court with instructions to make and enter judgments herein in favor of the appellant and against each respondent consistent with the views expressed in this opinion. Each party to bear their own costs on this appeal.

Costs in this Court:
Cross-Appellants Appearance - $20.00
Respondent Appearance - $ None
Remittitur - - - - - - - - - - - - $ None

Said judgments to be carried into execution according to the terms of December 30, A.D. 1960.

You, THEREFORE, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, not inconsistent with the opinion hereto attached.

WITNESS: The Honorable James T. Harrison, Chief Justice of the Supreme Court of the State of Montana, this Tenth day of January, A.D. 1961.

(SEAL OF SAID COURT)

THOMAS J. KEARNEY,
Clerk of the Supreme Court of the State of Montana.

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n.b. In this remittitur and judgment of the Montana Supreme Court above set forth, the recital regarding the Judgments of the District Court involves an obvious clerical error inasmuch as the Judgments of the District Court were in favor of the plaintiffs and respondents and cross-appellants and against the defendants and appellants and cross-respondents.

JUDGMENTS OF THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF YELLOWSTONE

1. Yellowstone Pipe Line Company case.

(Title of Court and Cause)

This cause came on regularly for trial on the 27th day of August, 1958, with A. T. Smith, Esq., and R. C. Hawley, Esq., of Denver, Colorado, and Edmond G. Toomey, Esq., and Michael J. Hughes, Esq., of Helena, Montana, appearing as counsel for the Plaintiff, and George T. Bennett, Esq., Tax Counsel for Defendant The State Board of Equalization of the State of Montana, and Joseph E. Buley, Esq., County Attorney of Yellowstone County, Montana, appearing for the Defendants, The State Board of Equalization of the State of Montana, and J. F. Reid, E. J. Byrne and W. J. Winters, as members of and constituting said The State Board of Equalization of the State of Montana, Yellowstone County, Montana, and Allan Parson as County Treasurer of Yellowstone County, Montana (by substitution for the original Defendant, C. O. Thompson, as County Treasurer). A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court, sitting without a jury, whereupon witnesses on the part of plaintiff and the defendants were duly sworn and examined and documentary evidence introduced by the respective parties, and a Statement of Agreed Facts by all of the parties to this action, the taking of evidence being concluded on the 29th day of August, 1958, and the parties at the close of the evidence having requested the Court to make Findings of Fact and Conclusions of Law, and having thereafter, respectively, proposed written Findings of Fact and Conclusions of Law to the Court, and having presented to the Court their respective Briefs, and the action by agreement at the close of the evidence being finally submitted for decision to the Court following and after the receipt of said Briefs and such proposed Findings

of Fact and Conclusions of Law, and the Court, after due deliberation thereon and being fully advised in the premises, having filed herein on the 10th day of March, 1959, its FINDINGS OF FACT AND CONCLUSIONS OF LAW, and having directed that judgment be entered in accordance therewith, and MARJORY C. THOMPSON, County Treasurer of Yellowstone County, Montana, having been substituted as a party defendant in the place and stead of ALLAN PARSON, by Order made and entered herein on the 10th day of March, 1959,

NOW, THEREFORE, by reason of the law and the Findings aforesaid,

It is ORDERED, ADJUDGED AND DECREED that YELLOWSTONE PIPE LINE COMPANY, a Delaware corporation, the Plaintiff herein, do have and recover of the County Treasurer of Yellowstone County, Montana, to-wit, MARJORY C. THOMPSON, successor in office to ALLAN PARSON, as County Treasurer of Yellowstone County, Montana, the sum of SIX THOUSAND FOUR HUNDRED THIRTY-SEVEN and 65/100 DOLLARS ($6,437.65) out of the sum of $18,313.39 paid by Plaintiff to the County Treasurer of Yellowstone County, Montana, under written protest, on or about the 26th day of November, 1955 as and for ad valorem taxes for the year 1955 demanded of said Plaintiff by the County Treasurer of Yellowstone County, Montana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana, and the defendant MARJORY C. THOMPSON, as County Treasurer of Yellowstone County, Montana, shall, upon receiving a certified copy of this Judgment, refund and pay back to Plaintiff, YELLOWSTONE PIPE LINE COMPANY, a Delaware corporation, the said sum of SIX THOUSAND FOUR HUNDRED THIRTY-SEVEN and 65/100 DOLLARS ($6,437.65) out of the sum of $18,313.39

paid by said Plaintiff under written protest to the County Treasurer of Yellowstone County, Montana, on or about November 26th, 1955, as and for ad valorem taxes demanded of it by said County Treasurer for the year 1955.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment against the defendants for its costs and disbursements herein expended or incurred, amounting to the sum of $17.05.

DONE and DATED this 13th day of March, 1959.

E. E. FENTON,
District Judge

FILED March 13, 1959.

2. Oil Basin Pipeline Company case.

(Title of Court and Cause)

This cause came on regularly for trial on the 27th day of August, 1958, with Edmond G. Toomey, Esq., and Michael J. Hughes, Esq., of Helena, Montana, appearing as counsel for the Plaintiff, and George T. Bennett, Esq., Tax Counsel for Defendant The State Board of Equalization of the State of Montana, and Joseph E. Buley, Esq., County Attorney of Yellowstone County, Montana, appearing for the Defendants, The State Board of Equalization of the State of Montana, and J. F. Reid, E. J. Byrne and W. J. Winters as members of and constituting said The State Board of Equalization of the State of Montana, Yellowstone County, Montana, and Allan Parson as County Treasurer of Yellowstone County, Montana (by substitution for the original Defendant, C. O. Thompson, as County Treasurer). A trial by jury having been expressly waived by the respective parties, the cause was tried before the Court, sitting without a jury, whereupon witnesses on the part of plaintiff and the defendants were duly sworn and examined and documentary evidence introduced by the respective parties, and a Statement of Agreed Facts by all

of the parties to this action, the taking of evidence being concluded on the 29th day of August, 1958, and the parties at the close of the evidence having requested the Court to make Findings of Fact and Conclusions of Law, and having thereafter, respectively, proposed written Findings of Fact and Conclusions of Law to the Court, and having presented to the Court their respective Briefs, and the action by agreement at the close of the evidence being finally submitted for decision to the Court following and after the receipt of said Briefs and such proposed Findings of Fact and Conclusions of Law, and the Court, after due deliberation thereon and being fully advised in the premises, having filed herein on the 5th day of March, 1959, its FINDINGS OF FACT AND CONCLUSIONS OF LAW, and having directed that judgment be entered in accordance therewith, and MARJORY C. THOMPSON, County Treasurer of Yellowstone County, Montana, having been substituted as a party defendant in the place and stead of ALLAN PARSON, by Order made and entered herein on the 10th of March, 1959.

NOW, THEREFORE, by reason of the law and the findings aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that OIL BASIN PIPELINE COMPANY, a Delaware corporation, the Plaintiff herein, do have and recover of the County Treasurer of Yellowstone County, Montana, to-wit, MARJORY C. THOMPSON, successor in office to ALLAN PARSON, as County Treasurer of Yellowstone County, Montana, the sum of FIFTEEN THOUSAND ONE HUNDRED EIGHTEEN and 50/100 DOLLARS ($15,118.50) out of the sum of of $37,944.01 paid by Plaintiff to the County Treasurer of Yellowstone County, Montana, under written protest, in two installments as and for ad valorem taxes for the year 1955 demanded of said Plaintiff by the County Treasurer of Yellowstone County, Montana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana, and the defendant MARJORY C. THOMPSON, as County Treasurer of Yellowstone County, Montana, shall, upon receiving a certified copy of this Judgment, refund and pay back to Plaintiff, OIL BASIN PIPELINE COMPANY, a Delaware corporation, the said sum of FIFTEEN THOUSAND ONE HUNDRED EIGHTEEN and 50/100 DOLLARS ($15,118.50) out of the sum of $37,944.01 paid by said Plaintiff under written protest to the County Treasurer of Yellowstone County, Montana, as and for ad valorem taxes demanded of it by said County Treasurer for the year 1955.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff have judgment against the defendants for its costs and disbursements herein expended or incurred, amounting to the sum of $17.05.

DONE and DATED this 10th day of March, 1959.

E. E. FENTON,
Judge

FILED March 10, 1959

APPENDIX C

STATUTES INVOLVED

REVISED CODES OF MONTANA (1947)

SECTION 84-301.

(1999) *Classification of property for taxation.* For the purpose of taxation the taxable property in the state shall be classified as follows:

Class One. The annual net proceeds of all mines and mining claims, after deducting only the expenses specified and allowed by section 84-5403; also where the right to enter upon land, to explore or prospect, or dig for oil, gas, coal or mineral is reserved in land by any person or corporation, the surface title to which has passed to another, the assessor and the state and county boards of equalization shall determine the value of the right to enter upon said tract of land for the purpose of digging, exploring, or prospecting for gas, oil, coal or minerals, and the same shall be placed in this classification for the purpose of taxation.

Class Two. All household goods and furniture, including clocks, musical instruments, sewing machines, wearing apparel of members of the family, and all personal property actually used by the owner for personal and domestic purposes, or for the furnishing or equipment of the family residence; all agricultural and other tools, implements and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks and other power-driven cars, vehicles of all kinds, boats and all water craft, harness, saddlery and robes.

Class Three. Livestock, poultry and the unprocessed products of both; stocks of merchandise of all sorts, together with furniture and fixtures used therewith; and all office or hotel furniture and fixtures.

Class Four. All land, town and city lots, with improve-

ments, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the constitution of Montana, and except as such property may be included in Class Five.

Class Five. (a) All moneys and credits, secured or unsecured including all state, county, school district and other municipal bonds, warrants and securities, without any deduction or offset; provided, however, that the terms "moneys and credits" as herein used shall not embrace the moneyed capital employed in the banking business by any banking corporation or individual in this state.

(b) All poles, lines, transformers, transformer stations, meters, tools, improvements, machinery and other property used and owned by co-operative rural electrical and co-operative rural telephone associations organized under the laws of Montana.

(c) All unprocessed agricultural products either on the farm or in storage, irrespective of whether said products are owned by the elevator, warehouse or flour mill owner or company storing the same, or any other person whomsoever, and excepting livestock and poultry and the unprocessed products of both.

Class Six. Property formerly included in this class is now classified by section 84-308 of the Revised Codes of Montana, 1947.

Class Seven. All property not included in the six preceding classes.

SECTION 84-302.

(2000) *Basis for imposition of taxes.* As a basis for the imposition of taxes upon the different classes of property specified in the preceding section, a percentage of the true and full value of the property of each class shall be taken as follows:

Class 1. One hundred per cent of its true and full value.

Class 2. Twenty per cent of its true and full value.

Class 3. Thirty-three and one-third per cent of its true and full value.

Class 4. Thirty per cent of its true and full value.

Class 5. Seven per cent of its true and full value.

Class 6. Forty per cent of its true and full value.

Class 7. Forty per cent of its true and full value.

SECTION 84-401.

(2001) *Property assessed at cash value.* All taxable property must be assessed at its full cash value. Land and the improvements thereon must be separately assessed.

SECTION 84-901.

(2138) *Officers of certain telegraph, telephone, electric power and other lines to furnish statement to state board of equalization.* The president, secretary, or managing agent, or such other officer as the state board of equalization may designate, of any corporation, and each person or association of persons owning or operating a telegraph, telephone, electric power or transmission line, natural gas pipe line, oil pipe line, canal, ditch, flume, or other property, other than real estate not included in right of way, and which constitute a single and continuous property throughout more than one county; must, on or before the first Monday of March in each year, furnish the state board of equalization a statement, signed and sworn to by one of such officers or by the person or one of the persons forming such association, showing in detail for the year ending on the thirty-first day of December, immediately preceding, as follows:

1. The whole number of miles of said property in the state, and where the property is partly out of the state, the whole number of miles without the state and the whole number of miles within the state owned or operated by such corporation, person, or association.

2. The total value of the entire property and plant both within and without the state, and the total value of that portion of the same within the state.

3. A complete description of the property within the state, giving the points of entrance into and the points of exit from the state, and the points of entrance into and the points of exit from each county, with a statement of the total number of miles in each county in the state.

4. Such other information regarding such property as may be required by the state board of equalization.

SECTION 84-902.

(2139) *Statement to be transmitted by county assessor to state board.* The county assessor of every county must, on the first Monday in May of each year, transmit to the state board of equalization a statement showing:

1. The name and address of each corporation, person and association owning or operating any telegraph, telephone, electric power or transmission line, natural gas pipe line, oil pipe line, canal, ditch, flume, or other similar property in more than one county of the state, whose property, or any part thereof, has been assessed by such county assessor.

2. A complete description of all such property assessed to every such corporation, person, or association, together with the assessed value thereof.

SECTION 84-903.

(2141) *Hearing before the board.* After making such assessment, the board shall give at least ten (10) days written notice thereof to the person or persons to whom the assessment is made, designating a time and place for hearing thereon, at which time and place such person or persons, or any taxpayer may appear before the board in person, or otherwise, to show cause why such assessment should be either lowered or raised.

SECTION 84-904.

(2142) *Hearing for the determination of facts pertaining to assessment.* If any corporation, person or association shall fail, neglect, or refuse to furnish the state board of equalization with a full, true, and correct statement as required, and within the time, by section 84-901, or if the board shall have reason to believe that any such statement furnished the board is incorrect or erroneous in any particular, the board shall order a hearing for the purpose of ascertaining and determining such facts as will enable the board to assess the property of such corporation, person or association in accordance with the provisions of section 84-905. At least ten days' written notice of such hearing shall be given to such corporation, person, or association, and on such hearing the board shall ascertain and determine each and all of the matters and facts which should have been stated in such statement.

SECTION 84-905.

(2143) *Assessment of property—apportionment to counties.* The board must assess all the properties described in section 84-901, but franchises granted by the United States must not be assessed, the value of such properties for assessment purposes to be determined upon such factors as the board shall deem proper.

On or before the second Monday in July, the board shall apportion such assessment to the counties in which the properties are situated.

SECTION 84-906.

(2144) *Transmission of statement of amount apportioned to counties.* The state board of equalization, must, not later than the second Monday of July, transmit or mail to the county assessor of each county to which such apportionment has been made, a statement showing the length of the property in such county; a description of the same

sufficient for identification; the assessed value of the same as determined by the board; and the amount apportioned to the county. The county assessor must enter the statement on the assessment-roll or book of the county, and enter the amount of the assessment apportioned to the county in the column of the assessment-roll or book which shows the total value of all property for taxation in the county.

SECTION 84-907.

(2146) *Record of assessment and apportionment of properties.* The state board of equalization must keep a record of all such assessments and apportionments.

APPENDIX D

SUMMARY OF PLEADINGS, PROPOSED CONCLUSIONS OF LAW, CONCLUSIONS OF LAW, AND ARGUMENT SHOWING THE WAY IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED AND PASSED UPON

PLEADINGS

Each of the petitioners raised the federal questions here presented in Article XI of their respective complaints (R. 8, 9, 117) alleging that the exercise of arbitrary powers by the Board and that the valuations placed on each of these petitioners pipe line properties by the Board were in violation of the Fourteenth Amendment of the United States Constitution.

PROPOSED CONCLUSIONS OF LAW, CONCLUSIONS OF LAW AND ASSIGNMENT OF ERRORS

Each of the petitioners filed with the District Court a proposed Conclusion of Law (R. 65, 165) to the effect that the assessment of its property constituted an arbitrary and discriminatory exercise of the Board's powers and denied the protection afforded by the Fourteenth Amendment.

The District Court in its Conclusions of Law (R. 98, 99, 198) ruled that the Board in its assessments denied each of the petitioners respectively the equal protection of the laws guaranteed by the Fourteenth Amendment.

The defendants in taking their appeal made no specific mention of the federal question upon which the District Court had ruled against them (R. 785, 786), nor did they in their brief before the Montana Supreme Court include this federal question in the specifications of error.

ARGUMENT

Each of the petitioners in its brief in the Supreme Court of Montana argued that the discrimination in the assessment ratio applied to its pipe line properties by the Board involved a violation of the Fourteenth Amendment. Consolidated Brief of Yellowstone Pipe Line Company, Page 63; Consolidated Brief of Oil Basin Pipeline Company, Pages 37, 38, 84. (Each of these briefs is contained in the record certified to this Court.)

No._____

In the Supreme Court of the United States

OCTOBER TERM, 1960

YELLOWSTONE PIPE LINE COMPANY,

Petitioner,

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA: DAN FULTON, E. J. BYRNE and JOHN C. ALLEY, members of and constituting The State Board of Equalization of the State of Montana; YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana; MARJORY C. THOMPSON as Treasurer of the said Yellowstone County, Montana; and T. A. COTHRON as Assessor of said Yellowstone County, Montana,

Respondents,

OIL BASIN PIPE LINE COMPANY,

Petitioner,

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA: DAN FULTON, E. J. BYRNE and JOHN C. ALLEY, members of and constituting The State Board of Equalization of the State of Montana; YELLOWSTONE COUNTY, MONTANA, a political subdivision of the State of Montana; MARJORY C. THOMPSON as Treasurer of the said Yellowstone County, Montana; and T. A. COTHRON as Assessor of said Yellowstone County, Montana,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Brief for Respondent in Opposition

ARGUMENT

I.

The decision of the Montana Supreme Court is in complete accord with applicable decisions of this court.

In support of their contention that the decision of the Montana Supreme Court in these cases is not in accord with prior decisions of this court, petitioners present two constitutionally irrelevant arguments.

Petitioners first argue (Petition, pp. 9-10) that only the Montana legislature can classify property for the purposes of taxation and that since Montana's classification statutes do not recognize pipelines as a separate class, Montana's Board of Equalization cannot do so. The Montana Supreme Court has construed the Montana constitution and statutes as allowing the Board to recognize pipe lines as a separate class. *Yellowstone Pipe Line Co. v. State Board of Equalization,* ____ Mont.____, 358 P. 2d 55, Appendix to Petition, p. 22. Since it is not denied that products pipe lines constitute a class of property which may be treated differently from other classes of property for purposes of taxation, and recognition of this difference has been approved by the Montana Supreme Court, no violation of the Fourteenth Amendment is established. *Nashville, Chattanooga & St. Louis Ry. v. Browning,* 310 U.S. 362, 368-69.

Petitioners next contend, at pp. 11-12 of their Petition, that the systematic undervaluation of real properties

in the state discriminates against them in that it causes them to bear a disproportionately large share of the tax burden of the state. However, under Section 84-301, Revised Codes of Montana, 1947, real property is classified under Class Four, a different classification than that assigned to the property of the Petitioners. It is well settled that if a tax applies to a class which may be separately taxed, those within the class may not complain because others, not of the class, are taxed improperly, *Morf. v. Bingaman,* 298 U.S. 407, 413; *Michigan Central R.R. v. Powers,* 201 U.S. 245, 301; *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 509. Thus the fact that property of a different class is assessed differently than that of petitioners can afford no basis for relief.

Petitioner's basic contention is that the Montana Supreme Court misinterpreted the holding of this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning, supra,* which case is attempted to be distinguished on the ground that the action there complained of was a settled state practice, while such is not true in the instant case. The facts of the case at bar, rather than distinguishing it from *Browning,* bring it clearly within the holding of that case. In *Browning,* this court sought to determine whether Tennessee had made a separate classification of railroad property for tax purposes. This court found that Tennessee "law" did separately classify state property, this "law" being the settled practice of the Tennessee Railroad and Public Utilities Commission. This settled practice was

consulted only because there was no more conventional source of Tennessee law available to justify the classification made, the court stating, at 310 U.S. 369:

> "If the state supreme court had construed the . . . Tennessee Constitution so as to permit recognition of these diversities, (separate classification of railroad properties) no appeal could successfully be made to the Fourteenth Amendment."

Here, the Montana Supreme Court has construed the Montana Constitution as allowing the State Board of Equalization to tax products pipe lines as a separate class. Thus no constitutional violation is shown.

II.

The decision of the Montana Supreme Court does not sanction assessment of property on an individual basis.

At page 15 of their Petition, petitioners attempt to persuade this Court, that if allowed to stand, the decision in this case will engender wholesale constitutional violations in the application of Montana's taxing laws. There is nothing, either in this decision or in prior decisions of the Montana Supreme Court, to give credence to such a fear. That all property similarly situated must be similarly taxed remains the law in Montana. *Hilger v. Moore,* 56 Mont. 146, 170, 182 Pac. 477, 481-82; *State v. North American Car Corporation,* 118 Mont. 183, 193; 164 P. 2d 161, 166. The State Board of Equalization is continuing its efforts, in accord with the dictates of law and reason, to improve assessment practices in Montana (R. 263).

CONCLUSION

The questions sought to be reviewed are not novel. The principles governing their disposition have long been settled by the decisions of this Court. These principles were correctly applied in this case. Review by this Court would neither clarify the law nor correct an injustice. For these and the reasons detailed above, the petition for writ of certiorari should be denied.

Respectfully submitted,

FORREST H. ANDERSON,
Attorney for Respondent

Of Counsel:
SIDNEY O. SMITH,
DONALD A. GARRITY.